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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 581

LARRY THEODORE FRENCH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

JURISDICTIONAL STATEMENT

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Subject Index

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
The questions are substantial	4
Conclusion	7

Appendix

Notification of judgment ..... App. A

Table of Authorities Cited

Cases	Page
Bantam Books v. Sullivan, 372 US 58, 9 L.ed.2d 584 (Headnote 1)	2
Connally v. Gen. Constr. Co., 269 US 385, 70 L.ed. 322	6
Blaney, In re, 30 Cal.2d 643	6
In re Lockett, 179 Cal. 581, 178 P. 134	5
In re Newbern, 53 Cal.2d 786	6, 7
In re Peppers, 189 Cal. 682	6
Katsev v. Los Angeles, 52 Cal.2d 360	6
Kraus & Bros. v. United States, 327 US 614, 90 L.ed. 894	5, 6
Lanzetta v. New Jersey, 306 US 451	6
Lockett, In re 179 Cal. 581, 178 P. 134	5
Market Basket v. Jacobson, 134 Cal.App.2d 73	6
Mishkin v. New York, 16 L.ed.2d 56 (Headnote 10)	2
Newbern, In re, 53 Cal.2d 786	6, 7
People v. Bldg. Maintenance etc. Assn., 41 Cal.2d 719	6
People v. Daniels, 168 Cal.App.2d Supp. 788	6
People v. McCaughan, 49 Cal.2d 409	6
People v. Saad, 105 Cal.App.2d Supp. 851, 234 P.2d 75	6
Peppers, In re, 189 Cal. 682	6
Robinson v. California, 370 US 660, 8 L.ed.2d 758 (Headnote 1)	2
United States v. Cardiff, 344 US 174, 97 L.ed. 200	6
Winters v. New York, 333 US 507, 92 L.ed. 840	6

Page

Statutes

Constitution of California
Article 4, Section 24 5

Constitution of the United States
Fourteenth Amendment 2, 3, 4

Penal Code of California
Section 290 4
Section 314.1 ..... 1, 3, 4

United States Code
Title 28, Section 1257(2) 2

Rules

Rules of the Supreme Court of the United States
Rule 13 1
Rule 15 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

LARRY THEODORE FRENCH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

JURISDICTIONAL STATEMENT

Appellant files the following jurisdictional statement pursuant to Rules 13 and 15, Rules of the Supreme Court of the United States.

Opinion Below

There was no written opinion in the court below in this matter. A copy of the notification of judgment is attached hereto as Appendix A.

Jurisdiction

Appellant challenged the constitutionality of certain words in Section 314.1 of the Penal Code of the State of California. The judgment was handed down by the Appellate Department of the Superior Court of the State

of California for the County of Los Angeles on June 3, 1966. The notice of appeal was filed July 8, 1966 and the record has been docketed with the Court within 60 days thereof. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, Section 1257(2), U.S. Codes. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Bantam Books v. Sullivan,* 372 US 58, 9 L.ed.2d 584 (Headnote 1); *Robinson v. California,* 370 US 660, 8 L.ed.2d 758 (Headnote 1); *Mishkin v. New York,* 16 L.ed.2d 56 (Headnote 10).

Questions Presented

1. Whether the words "willfully" and "lewdly", inherently and as construed and applied in this case, are so vague, indefinite and uncertain as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the words "private parts", inherently and as construed and applied in this case, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States by reason of the vagueness, indefiniteness and uncertainty of the statute and its failure to set up guidelines.

3. Whether the acts charged here constitute willfulness.

4. Whether the acts charged here constitute lewdness.

5. Whether the acts charged here constitute an exposure of private parts.

Statutes Involved

Fourteenth Amendment, United States Constitution:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 314.1, Penal Code of California:

> "Every person who willfully and lewdly, either
>
> "1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; . . . is guilty of a misdemeanor. . . ."

Statement

Appellant was arrested on a charge of violating Section 314.1 of the Penal Code of the State of California.

A woman claimed to have seen appellant with his pants unzipped and his penis exposed as she walked along the street about 5:30 in the afternoon. There were no statements made, no gestures, and, according to her testimony, the organ was flaccid. (R.T. 62) She said she went in to call the police and when she came out and was across the street, she saw the same thing. She thereafter followed the gentleman to get the license number of his automobile. He was carrying some bakery goods from a nearby bakery.

Appellant vigorously denied the charge made by the lady and denied any intent of any kind. The lady witness was a middle-aged woman, while appellant's wife is a young woman of about 22, appellant being 31 years of age. Appellant (a defense worker) and his wife live in the neighborhood of the alleged occurrence and he had stopped on his way home at a bakery on a corner nearby.

Appellant was found guilty on one count, was given summary probation and fined $100, which fine and sentence carries with it a requirement of registration under Section 290 of the Penal Code of the State of California. The judge ordered registration suspended unless the judgment became final.

The Questions Are Substantial

At the trial, appellant challenged the constitutionality of the words "willfully", "lewdly", and "private parts", as being too vague, indefinite and uncertain as to constitute a criminal offense under the Fourteenth Amendment to the Constitution of the United States. His challenge to the statute was overruled in the trial court and in the appellate court.

Appellant also raised the question of the vagueness and indefiniteness of the statute on motion for new trial, as violative of due process of law under the Fourteenth Amendment to the Constitution of the United States. His motion was denied.

Appellant contends that Section 314.1, inherently and as construed and applied in this case, fails to set up any guidelines or definition as to what constitutes lewdness and what constitutes willfulness and lewd conduct. He

also challenged the words "private parts" as having no definition as to whether they meant sexual organs or some other parts of the body, and that the statute did not spell out when and how it would become a public offense.

Appellant again raised the questions in the Appellate Department of the Superior Court, the last court to which the question could be taken, and that court overruled his claim of unconstitutionality on the grounds of vagueness and indefiniteness.

In *Kraus & Bros. v. United States,* 327 US 614, 90 L.ed. 894, the Court said that the language used must be explicit and unambiguous: "They must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. . . . The dividing line between unlawful evasion and lawful action cannot be left to conjecture . . . patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution."

In Article 4, Section 24 of the California Constitution it is stated that all laws must be published in no other than the English language. Implicit in this provision is that it must be English language that is clearly defined and clearly set forth and clearly understood.

In re Lockett, 179 Cal. 581, 178 P. 134, held unconstitutional a sexual act which was expressed in Latin words. Nevertheless, there is no reason why the Legislature could not have specified exposure of the penis or exposure of the vagina or exposure of the teats or whatever private part the Legislature intended to make

specifically a crime. Without it, the words "private parts" are too vague and indefinite to constitute a standard of guilt.

The leading cases on this subject are: *Kraus & Bros. v. United States,* 327 US 614, 90 L.ed. 894; *Connally v. Gen. Constr. Co.,* 269 US 385, 70 L.ed. 322; *Lanzetta v. New Jersey,* 306 US 451; *In re Blaney,* 30 Cal.2d 643, 656; *People v. Saad,* 105 Cal.App.2d Supp. 851, 234 P. 2d 75; *Market Basket v. Jacobson,* 134 Cal.App.2d 73; *People v. Bldg. Maintenance etc. Assn.,* 41 Cal.2d 719, 725; *United States v. Cardiff,* 344 US 174, 97 L.ed. 200; *Winters v. New York,* 333 US 507, 92 L.ed. 840; *People v. McCaughan,* 49 Cal.2d 409, 414; *Katzev v. Los Angeles,* 52 Cal.2d 360; *In re Newbern,* 53 Cal.2d 786, 792; *In re Peppers,* 189 Cal. 682.

In the former vagrancy statute which preceded Section 314, a common drunkard was declared to be a vagrant and in *People v. Daniels,* 168 Cal.App.2d Supp. 788, 802, the appellate court thought that the term was susceptible of a reasonable interpretation and that uncertainties had been resolved by judicial decision. However, in *In re Newbern,* 53 Cal.2d 786, the Supreme Court held the provision unconstitutional on the following grounds:

(1) "Common" and "common drunk" are subject of numerous conflicting dictionary and judicial definitions, hence have no certain ordinary meaning. This is equally true of the words "private parts", which have various and sundry definitions of the words "parts" and have a general definition even in the larger unabridged dictionary.

(2) In *In re Newbern, supra,* the court held that the words are not medical terms and have no established technical meaning. Likewise, the words "lewd" and "private parts" have no medical meaning and no established technical meaning.

(3) They have no common law meaning.

On the basis of the *Newbern* case, we submit that the statute is unconstitutional.

Conclusion

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

MORRIS LAVINE

Attorney for Appellant

APPENDIX A

Appellate Department

SUPERIOR COURT, LOS ANGELES COUNTY, CALIFORNIA

No. CR. A. 6870

People vs. French

Judgment and Order in the above entitled appeal are affirmed. Judgment filed.

Date June 3, 1966

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By J. MacGREGOR, Deputy

SUBJECT INDEX

	Page
Statement	2
Argument	3
I.	
California Penal Code Section 314.1 is neither vague, indefinite nor uncertain	3
II.	
The Supreme Court of the United States should not take jurisdiction to review an order where no opinion was delivered by the highest state court	6
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases	Page
Clark v. People, 79 N.E. 941, 224 Ill. 554	4
Davis, In re, 242 A.C.A. 760, 51 Cal. Rptr. 701	6
Giaccio v. Pennsylvania, 382 U.S. 399, 15 L. Ed. 2d 447	5
Lane, In re, 58 Cal. 2d 99, 372 P. 2d 897	6
Luce, In re, 64 A.C. 9, 409 P. 2d 918	6
Mikkelsen, In re, 226 Cal. App. 2d 467, 38 Cal. Rptr. 106	6
Nash, State of, 145 Atl. 262, 83 N.H. 536	4
Pendell v. State, 253 S.W. 2d 426, 158 Tex. Crim. R. 119	4
People v. Babb, 103 Cal. App. 2d 326, 229 P. 2d 843	4
People v. Beaugez, 232 Cal. App. 2d 650, 43 Cal. Rptr. 28	4
People v. Loignon, 160 Cal. App. 2d 412, 325 P. 2d 54	4
Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908	6
State v. Moore, 241 P. 2d 455, 194 Ore. 232	4
Stembridge v. Georgia, 343 U.S. 541, 96 L. Ed. 1130	7
Winters v. New York, 337 U.S. 507, 92 L. Ed. 2d 840	4

Dictionaries Page

Webser's Seventh New Collegiate Dictionary (1965) 4

Webster's Third New International Dictionary (1967) 4

Rules

California Rules of Court, Rule 63 6

Revised Rules of the Supreme Court of the United States, Rule 16 1

Statutes

California Penal Code, Sec. 7.1 4

California Penal Code, Sec. 314.1 .....2, 3, 5, 6

IN THE

Supreme Court of the United States

October Term, 1966
No. 581

LARRY THEODORE FRENCH,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered June 3, 1966, be affirmed, and/or that the appeal taken therefrom to this Court, be dismissed on the ground that the federal question is so unsubstantial as not to warrant further argument, and upon the further ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

This is a direct appeal from a judgment entered June 3, 1966, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in a verified complaint, filed in the Municipal Court of the Los Angeles Judicial District with having committed two violations of California Penal Code Section 314.1. It was alleged that appellant "did willfully and unlawfully lewdly expose his person, and the private parts thereof, in a public place and in a place where there were present other persons to be offended and annoyed thereby, to wit: Ventura Boulevard."

The case was tried by the court without a jury. The appellant was adjudged guilty of Count I and not guilty of Count II. An appeal was duly taken to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matter was submitted and thereafter the judgment was affirmed. (Jurisdictional Statement, Appendix "A".) A notice of appeal to this Court was thereafter presented.

ARGUMENT.

I.

California Penal Code Section 314.1 Is Neither Vague, Indefinite nor Uncertain.

California Penal Code Section 314.1:

> "Every person who willfully and lewdly, either (1) Exposes his person, or the private parts thereof, in any place, or in any place where there are present other persons to be offended or annoyed thereby; . . . is guilty of a misdemeanor. . . ."

On February 2, 1965, Eddie Joan Knowles observed the appellant walking on Ventura Boulevard, a public street in the City of Los Angeles. The appellant was the only other person on the street. At a distance of twenty feet, she could see that the zipper of his pants was open and the appellant had his private parts exposed. [R.T. p. 56.] The appellant passed by the complaining witness and then zipped up his pants. [R.T. p. 58.]

After Miss Knowles made a phone call to the police, she observed the appellant a second time. He again had his pants unzipped and his private parts were exposed. [R.T. p. 59.] The appellant looked at the witness, but did not say anything. [R.T. p. 61.] He zipped up his pants again. [R.T. p. 62.]

Appellant's Jurisdictional Statement challenges the constitutionality of the words "willfully", "lewdly" and "private parts" as used in California Penal Code Section 314.1.

"Willfully" when applied to the intent with which an act is done, implies simply a purpose or willingness to commit the act. (California Penal Code Sec. 7.1; *People v. Beaugez,* 232 Cal. App. 2d 650, 43 Cal. Rptr. 28.)

People v. Loignon, 160 Cal. App. 2d 412, 325 P. 2d 54, held that the word "lewdly" did not render a statute too vague to meet the requirements of due process. "Lewd" is defined to mean: lustful; libidinous; lascivious unchaste. (*People v. Babb,* 103 Cal. App. 2d 326, 229 P. 2d 843.) In *Winters v. New York,* 337 U.S. 507, 92 L. Ed. 2d 840, the court held that words such as "obscene, lewd, lascivious, filthy, indecent or disgusting" are well understood through long use in criminal law.

The term "private parts" used in describing a part of the human body refers to the genital organs. (*Clark v. People,* 79 N.E. 941, 224 Ill. 554; *State of Nash,* 145 Atl. 262, 83 N.H. 536; *State v. Moore,* 241 P. 2d 455, 194 Ore. 232; *Pendell v. State,* 253 S.W. 2d 426, 158 Tex. Crim. R. 119.) Webster's Third New International Dictionary (1967) defines "part" as: "a portion of a plant or animal body: the external genital and excretory organs—usually used in plural; called also private parts." A similar definition may be found in Webster's Seventh New Collegiate Dictionary (1965).

To comply with the constitutional requirement of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough

known to enable those persons within its reach to understand and correctly apply them.

Appellee contends that the term "private parts" is a term of common use and that further definition is not needed. Words used in a statute are to be taken in the ordinary and general sense. When the statute prohibits the exposure of the person or the private parts thereof, it is prohibiting the exposure of those private parts of a person which instinctive modesty, human decency or self-respect requires shall be customarily covered in the presence of other persons. The evidence at trial established that the appellant, while walking on a public street, willfully and lewdly exposed his private parts.

The words "willfully", "lewdly" and "private parts" are neither vague nor indefinite. The public is not uncertain as to the conduct prohibited by Penal Code 314.1, nor are judges or jurors left free to decide, without any legal standard, what is prohibited and what is not in each particular case. (*Giaccio v. Pennsylvania,* 382 U.S. 399, 15 L. Ed. 2d 447.) Reasonable men of common intelligence need not guess at the meaning nor differ as to the application of Penal Code Section 314.1.

II.

The Supreme Court of the United States Should Not Take Jurisdiction to Review an Order Where No Opinion Was Delivered by the Highest State Court.

Appellant is incorrect when he states that the Appellate Department of the Superior Court was "the last court to which the question could be taken." Under California Rules of Court, Rule 63, the Superior Court on application of a party may certify that the transfer of a case to the District Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law.

After the Appellate Department of the Superior Court affirmed the judgment, the appellant did not petition for a rehearing and/or Certification to the District Court of Appeal. Therefore the judgment he appeals from is not from the last state court to which the question could be taken. (*Schmerber v. California,* 384 U.S. 757, 16 L. Ed. 2d 908, Ftn. 3.)

Though Penal Code Section 314.1 has been referred to in numerous cases (*In re Lane,* 58 Cal. 2d 99, 372 P. 2d 897; *In re Mikkelsen,* 226 Cal. App. 2d 467, 38 Cal. Rptr. 106; *In re Luce,* 64 A.C. 9, 409 P. 2d 918; *In re Davis,* 242 A.C.A. 760, 51 Cal. Rptr. 701; hearing denied, 65 A.C. No. 1 minutes p. 3), neither the California Supreme Court, nor the District Court of Appeal has expressly considered the constitutionality of the section. However, there has been no ruling in any California case that would cast doubt on the constitutionality of the statute.

In *Stembridge v. Georgia,* 343 U.S. 541, 96 L. Ed. 1130, it was held that where the highest court of the state delivers no opinion and it appears the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment.

The Appellate Department of the Superior Court delivered no opinion when it affirmed the judgment. The appellant did not give the highest court of the state an opportunity to rule on the question he raises in this appeal.

Conclusion.

The appeal does not disclose that there has been a violation of appellant's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not theretofore determined by this court.

Appellee urges, therefore, that the appellant presents no substantial question for the decision of this court; that the judgment sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

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LARRY THEODORE FRENCH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING

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TABLE OF AUTHORITIES CITED

Cases	Page
Bantam Books v. Sullivan, 372 US 58, 9 L.ed.2d 584	10
Lanzetta v. New Jersey, 306 US 451, 83 L.ed. 888	3, 7, 8
Mishkin v. New York, 16 L.ed.2d 56	10, 11
Robinson v. California, 370 US 660, 8 L.ed.2d 758	11
Screws v. United States, 325 US 91, 89 L.ed. 1495	4
Winters v. New York, 333 US 507, 92 L.ed. 804	8, 9

STATUTES

Constitution of the United States Fourteenth Amendment	1, 2
Penal Code of California Section 7(1)	7
Section 290	2
Section 314.1	1
United States Code Title 28, Section 1257(2)	11

IN THE

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OCTOBER TERM, 1966

No. 581

LARRY THEODORE FRENCH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING

Larry Theodore French, a defense plant worker with substantial rights of reputation which would disappear if the judgment in this case is finally sustained, respectfully moves this Court to re-examine this appeal and to grant a rehearing thereon on the basis that, contrary to the order of dismissal, this case does present a substantial federal question of due process which heretofore has on many occasions resulted in hearings granted and decisions by this Court reversing the judgments.

This is an appeal from California Penal Code Section 314.1 which has been attacked as unconstitutional under the Fourteenth Amendment, U.S. Constitution, inherently and as construed and applied in this case as being too vague and indefinite to constitute a criminal statute.

This ground has always been considered substantial where supported by the record. We respectfully submit that the record supports this ground where the words used in the statute contain no definition or limitation and are not subject to common definition or explanation.

The words involved here as being too vague and uncertain and not defined by the California statute are the words "willfully", "lewdly" and "private parts".

We assign the following grounds for rehearing:

1. The Court erred in holding that the questions presented did not present substantial questions.

The words involved in this case are words used very widely in cases involving obscenity, misconduct of men and women involving exposure of the male sexual organs, the female sexual organs or rectum, the breasts and "topless" performances and others, and as to whether the words in this case, undefined and unlimited, are so vague, indefinite and uncertain as to violate the due process clause of the Fourteenth Amendment.

In California, violation of the section involved requires registration and subjects the alleged offender to the registration and reporting statute as a sexual offender. Section 290, Penal Code of California.

This Court, in holding that the question is not substantial, has therefore overlooked its numerous decisions as to vagueness and indefiniteness of statutes as making the statutes unconstitutional in violation of the due process clause of the Fourteenth Amendment.

Thus, in the case of *Lanzetta v. New Jersey,* 306 US 451, 83 L.ed. 888, the Court held that the single word "gangster" was too vague and uncertain to constitute a penal statute.

The Court, in *Lanzetta v. New Jersey*, said:

> "The phrase 'consisting of two or more persons' is all that purports to define 'gang.' The meanings of that word indicated in dictionaries and in historical and sociological writings are numerous and varied."

The meanings of the words "private parts" are numerous and varied. In some cases they refer to the female sex organs or the rectum, or they may refer to the top portion of the body, such as the breasts, which recently have been the subject of considerable legal contention in shows where the actresses or waitresses are "topless". In the case of males, "private parts" could mean either the organs of procreation or the rectum. But the statute does not define them.

The word "lewdly" is not defined in the California statute and the statute contains no definition of just what is "lewd" and whether it consists of an exposure coupled with a manifestation of a sexual nature or whether it is something else. It is not explained in any definition.

Nor is the word "willfully", as contained in this particular statute, defined. "Willfully" has many meanings in different situations and requires definition, which the Court has apparently overlooked.

Screws v. United States, 325 US 91, 89 L.ed. 1495 In the *Screws* case, this Court said:

> "The requirement for a 'willful' violation was introduced by the draftsmen of the Criminal Code of 1909. Act of March 4, 1909, 35 Stat 1088, 1092, c 321, 18 USCA § 52, 7 FCA title 18, § 52. And we are told 'willfully' was added to § 20 in order to make the section 'less severe.' 43 Cong Rec 60th Cong 2d Sess p 3599."

The federal government, in an opinion by Mr. Justice Douglas in *Screws v. United States,* 325 US 101, has defined willfulness as it applies to a criminal statute, as follows:

> "We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies v. United States, 317 US 492, 497, 87 L ed 418, 422, 63 S Ct 364. At times, as the Court held in United States v. Murdock, 290 US 389, 394, 78 L ed 381, 384, 54 S Ct 223, the word denotes an act which is intentional rather than accidental. And see United States v. Illinois C. R. Co. 303 US 239, 82 L ed 773, 58 S Ct 533. But 'when used in a criminal statute it generally means an act done with a bad purpose.' Id, 290 US p 394, 78 L ed 384, 54 S Ct 223. And see Felton v. United States, 96 US 699, 24 L ed 875; Potter v. United States, 155 US 438, 39 L ed 214, 15 S Ct 144; Spurr v. United States, 174 US 728, 43 L ed 1150, 19 S Ct 812; Hargrove v. United States (CCA 5th) 67 F(2d) 820, 90 ALR

1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 US 250, 66 L ed 604, 42 S Ct 301. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra (174 US p 734, 43 L ed 1152, 19 S Ct 812); United States v. Murdock, supra (290 US p 395, 78 L ed 385, 54 S Ct 223). And that issue must be submitted to the jury under appropriate instructions. United States v. Ragen, 314 US 513, 524, 86 L ed 383, 390, 62 S Ct 374.

An analysis of the cases in which 'willfully' has been held to connote more than an act which is voluntary or intentional would not prove helpful as each turns on its own peculiar facts. Those cases, however, make clear that if we construe 'willfully' in § 20 as connoting a purpose to deprive a person of a specific constitutional right, we would introduce no innovation. The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. See United States v. L. Cohen Grocery Co, 255 US 81, 65 L ed 516, 41 S Ct 298, 14 ALR 1045, supra. But where the punishment imposed is only for an

act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware. That was pointed out by Mr. Justice Brandeis speaking for the Court in Omaechevarria v. Idaho, 246 US 343, 62 L ed 763, 38 S Ct 323. An Idaho statute made it a misdemeanor to graze sheep 'upon any range usually occupied by any cattle grower.' The argument was that the statute was void for indefiniteness because it failed to provide for the ascertainment of boundaries of a 'range' or for determining what length of time was necessary to make a prior occupation a 'usual' one. The Court ruled that 'any danger to sheepmen which might otherwise arise from indefiniteness, is removed by § 6314 of Revised Codes, which provides that: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."' Id 246 US p 348, 62 L ed 768, 38 S Ct 323. A similar ruling was made in Hygrade Provision Co. v. Sherman, 266 US 497, 69 L ed 402, 45 S Ct 141. The charge was that a criminal statute which regulated the sale of 'kosher' meat or products 'sanctioned by the ortho-

dox Hebrew religious requirements' was unconstitutional for want of any ascertainable standard of guilt. The Court speaking through Mr. Justice Sutherland stated, '. . . since the statutes require a specific intent to defraud in order to encounter their prohibitions, the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such a requirement.' 266 US pp 502, 503. In United States v. Ragen, 314 US 513, 86 L ed 383, 62 S Ct 374, supra, we took that course in a prosecution for willful evasion of a federal income tax where it was alleged that the defendant had deducted more than 'reasonable' allowances for salaries. By construing the statute to require proof of bad faith we avoided the serious question which the rule of United States v. L. Cohen Grocery Co. 255 US 81, 65 L ed 516, 41 S Ct 298, 14 ALR 1045, supra, might have presented. We think a like course is appropriate here."

California's definition of the word "willful" is more vague and less certain. In Penal Code, Section 7(1), it states:

"1. The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another or to acquire any advantage;"

In *Lanzetta v. New Jersey*, 306 US 451, 83 L.ed. 888, this Court said:

"It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368, 75 L. ed. 1117, 1122, 51 S. Ct. 532, 73 A.L.R. 1484; Lovell v. Griffin, 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Constr. Co. 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 S. Ct. 126: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

As stated in the *Lanzetta* case, the descriptions and illustrations to indicate the meaning of "willfully", "lewdly" and "private parts" are not sufficient to constitute definition, inclusive or exclusive.

See also: *Winters v. New York*, 333 US 507, 92 L.ed. 804.

The *Winters* case involved the possession of a publication involving printing or selling or giving away books, pamphlets, etc., that have stories among other things of "lust or crime". The validity of the New York statute was attacked on the ground of vagueness and indefiniteness and this Court held that the question was substantial. It held that "The crime 'must be defined with appropriate definiteness'. Cantwell v. Connecticut, 310 US 396, 84 L.ed. 1213, Pierce v. U.S., 314 US 306, 311, 86 L.ed. 226. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, Lanzetta v. New Jersey, 306 US 451, or in regard to the applicable tests to ascertain guilt."

The Court held the statute unconstitutional.

In the dissenting opinion of *Winters v. New York*, it is stated:

> "Only a word needs to be said regarding Lanzetta v. New Jersey, 306 US 451, 83 L ed 888, 59 S Ct 618. The case involved a New Jersey statute of the type that seeks to control 'vagrancy.' These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col L Rev 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes,' and laws against 'gangs'

are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided."

In *Mishkin v. New York*, 16 L.ed.2d 56, the Court considered whether the word "obscene", as used in a State criminal obscenity statute, is vague and upheld the statute. We submit that the word "lewd" is vague. The Court in the *Mishkin* case refers to the "ambiguities inherent in the definition of obscenity". We point to the inherent ambiguities in the definition of "lewdness", "private parts" and "willfully".

Bantam Books v. Sullivan,
372 US 58, 9 L.ed.2d 584

It is respectfully submitted that the California statute avoids definiteness so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution.

We think the statute involved in this case contains substantial violations of constitutional rights of due process, is too vague and indefinite to constitute penal legislation and enables police to form a dragnet.

We pray for rehearing and reversal of the judgment below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

This petition for rehearing is filed in good faith and not for the purposes of delay and is based upon the Court's order dismissing the appeal on the ground that it presents no substantial federal question, a ground occurring since the filing of the appeal and this court's decision thereon. We submit that the grounds presented by this appeal present a substantial federal question and entitle the appellant to a hearing as a matter of right.

Title 28, Section 1257(2), U.S. Codes
Robinson v. California, 370 US 660, 8 L.ed.2d 758
Mishkin v. New York, 16 L.ed.2d 56

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